

1 John W. Larson, District Judge
2 Fourth Judicial District Dept. 3
3 Missoula County Courthouse
Missoula, MT 59802
(406) 523-4773

4 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

5 STATE OF MONTANA,

6 Plaintiff,

7 vs.

8 ROBERT S. MOUNT,

9 Defendant.

Dept. 3
Cause No. DC-00-255

OPINION AND ORDER

10 Before the Court is a motion in limine offered by the State of
11 Montana. Defendant Robert S. Mount opposes the motion. The motion
12 has been submitted on briefs and argued in various hearings and is
13 ready for decision.

14 The State moves to prohibit Mount or any defense witnesses from
15 alleging that the victim behaved in a flirtatious or sexually
16 suggestive manner towards Defendant. In response, Mount first
17 argues that any flirtatious or sexually suggestive conduct which
18 occurred on May 24, 2000, is admissible under the "transaction
19 rule." Section 26-1-103 MCA, provides that "where the declaration,
20 act, or omission forms part of a transaction which is itself the
21 fact in dispute or evidence of that fact, such declaration, act, or
22 omission is evidence as part of the transaction."

23 Mount is charged with the crime of sexual intercourse without
24 consent. Section 45-5-503, MCA, states:

25 (1) a person who knowingly has sexual intercourse without
26 consent with another person commits the offense of sexual
intercourse without consent. . . .

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1 Clearly, the jury must hear evidence of the interaction between the
2 parties to determine whether Mount knowingly had sexual intercourse
3 with Brandy Haley without Haley's consent. Such evidence is not
4 only admissible under the transaction rule, but it is relevant to
5 one of the elements of the crime charged. The Court finds that
6 evidence of Haley's flirtatious or sexually suggestive behavior
7 towards Mount on May 24, 2000, is admissible.

8 Second, Mount argues that evidence of flirtatious or sexually
9 suggestive conduct between Haley and Mount which occurred in weeks
10 immediately preceding May 24, 2000, the date of the alleged
11 incident, is relevant and admissible. The State cites State v.
12 Detonancour, 2001 MT 213, 34 P.3d 487, in which a defendant
13 attempted to introduce evidence that the victim pulled him onto her
14 lap two days before he sexually assaulted her. The Defendant argued
15 that this was sexual conduct between the victim and the defendant as
16 contemplated by the Rape Shield Statute, and that such testimony
17 related directly to his defense that he and the victim had engaged
18 in consensual sex.

19 Montana's Rape Shield Statute states in pertinent part:
20 No evidence concerning the sexual conduct of the victim is
21 admissible in prosecutions under this part except evidence of the
22 victim's past sexual conduct with the offender or evidence of
23 specific instances of the victim's sexual activity to show the
24 origin of semen, pregnancy, or disease which is at issue in the
25 prosecution.

26 The defendant argued that "sexual conduct" as contemplated in

1 the statute should include "lingering touches, smoldering glances,
2 the surreptitious passing of notes, casual contact between persons
3 at social gatherings, and other methods of flirtatious behavior
4 which form the invitation to engage in consensual sexual contact or
5 sexual intercourse." Id. at P 23.

6 The Court stated:

7 We decline to adopt this broad definition of sexual
8 conduct. As the compiler's comments note, if [defendant]
9 and [victim] had been sexually intimate previous to the
10 assault, that evidence would have been admissible.
11 However, flirtatious behavior is not, contrary to
12 Detonancour's opinion, an invitation to engage in sexual
13 relations. An examination into the nuances of the
14 victim's interactions with the defendant days before an
15 alleged rape would effectively put the victim on trial.
16 Not only is this evidence irrelevant to the issue of
17 consent, it is precisely the harm that the rape shield
18 statute is designed to prevent.

19 Id. at 491. The State concludes that in the present case,
20 allegations that Haley behaved flirtatiously or suggestively toward
21 Mount in the weeks prior to May 24, 2000, is prohibited under
22 Detonancour.

23 Mount argues that the holding in Detonancour is narrow; i.e.
24 that flirtatious and sexually suggestive behavior is simply not
25 sexual conduct as contemplated by the rape shield statute.

26 Therefore, Mount concludes that in this case, the rape shield
statute does not apply, and the Court must evaluate such evidence
under traditional rules of relevancy. Mount dismisses the Supreme
Court's language regarding a victim's interactions with the
defendant days before an alleged rape as dicta.

It is noteworthy that in Detonancour the State's motion in
limine requested a court order prohibiting the defense from offering

1 any evidence at trial concerning Jenkins's alleged sexual conduct.
2 Id. at P 13. Indeed, Mount appears to be correct in his analysis of
3 holding versus dicta. However, this Court agrees with the Supreme
4 Court that flirtatious or sexually suggestive behavior between two
5 people, prior to the "transaction," or events leading directly and
6 immediately toward alleged sexual contact, is irrelevant to the
7 issue of consent. While the Court realizes that people do not sign
8 consent forms prior to sex, i.e. that consent between persons who
9 are about to have sex is given through verbal and non-verbal signs
10 and suggestions, consent to have sex, an immediate and physical act,
11 can not be obtained days, weeks or months in advance.

12 The Court finds that evidence of flirtation or sexually
13 suggestive behavior between Haley and Mount at any time prior to May
14 24, 2000, is irrelevant to the issue of Haley's consent to engage in
15 sexual intercourse with Mount on that day. Such evidence is
16 inadmissible under Rule 402, M.R.Evid. For the foregoing reasons,

17 IT IS HEREBY ORDERED that the State's motion to prohibit Mount
18 or any defense witnesses from alleging that the victim behaved in a
19 flirtatious or sexually suggestive manner towards Mount is GRANTED,
20 with the exception of such behavior that may have occurred on May
21 24, 2000, or as otherwise permitted under the rules of evidence.

22 DATED this 15th day of January, 2002.

23
24 JOHN W. LARSON, District Judge

25 cc: County Attorney (Boylan)
26 William Boggs, Esq.